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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 278

AARON D. FRANK,

*Appellant,*

vs.

STATE OF MARYLAND,

*Appellee.*

ON APPEAL FROM THE CRIMINAL COURT OF BALTIMORE, MARYLAND

## PETITION FOR REHEARING

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Now comes the appellant, Aaron D. Frank, and respectfully prays the Court to grant rehearing in this cause.

In this appeal, appellant sought to set aside, as a violation of the Fourth and Fourteenth Amendments, his conviction by the Criminal Court of Baltimore, Maryland for refusing entry to his home to a health inspector without a warrant who sought to search the dwelling for suspected rat infestation. The Court upheld the conviction, four justices dissenting. Appellant respectfully submits that several of the grounds for affirmance assigned by the Court (slip opinion, No. 278) do not sustain the result reached.

## I.

The Court appears to rest its affirmance, in some important part, on Maryland history as evidenced by early Maryland legislation said to support entry without a warrant. But, appellant submits, the statutes referred to (slip opinion, No. 278, pp. 7-9, n. 5, 6, 9-11) did not, in the main, authorize or permit officers to enter generally the private homes of citizens, as does the ordinance attacked in this cause. Insofar as they purported to empower officials to enter *homes*, as distinguished from ships, carriages, shops or stores (all of which have a public or quasi-public nature), the early enactments were strictly limited in scope. Where they sought to permit entry into houses, it was ordinarily in relation to their use or occupancy in some special capacity, apart from their use as homes or dwelling places. The power to demand entry was directed not at dwellings *qua* dwellings, as is the health code provision here assailed, but at aspects of their use other than as homes.

Thus, *e.g.*, Maryland Laws, May 1756, p. 5, section XLVI, referred to by the Court (slip opinion, No. 278, p. 8, n. 6), empowered collectors of a tax imposed on certain spirituous beverages "which shall be retailed, or sold" (Maryland Laws, May 1756, p. 5, section XL) to "enter the House, Cellar, Vault, Store, or other Room *of such Retailer*, in the Day Time, to Gauge all the Vessels and Liquors aforesaid" and imposed sanctions if "*any such Retailer* shall refuse to permit any such Collector, or their Deputy, to enter as aforesaid, to Gauge or take Account of the Liquors aforesaid". (Emphasis added.)

Similarly, Maryland Laws, November 1789, c. VIII, section 5, described by the Court as "(t)ypical of the regulatory statutes enacted in this period" (slip opinion, No. 278, p. 9), imposed a monetary penalty on "any baker, or other

person" who "shall refuse to suffer the clerk of the market, . . . to enter his house, or other suspected place, to examine and weigh his bread". But the power to enter could have been no broader than the scope of the statute itself, which charged the appropriate officials "to set, ascertain and appoint, in any place or places within their respective jurisdictions, the assize and weight of the several sorts of bread following, *which shall in such place or places be made for sale, sold or exposed to sale*, and the price to be paid for the same" (*Id.*, section I; emphasis added).

The one enactment extended only to the houses of retailers of certain liquors, the other to those of sellers of certain bread. Each obviously dealt with an activity of a public nature and permitted entry not to the homes of all, but only to the home of the person engaged in that activity. The inference that the power of entry was intimately connected with the use of the house in the particular public pursuit, and not with its use as a home, is irresistible. The early legislation went no farther. The antecedent of the Baltimore health code provision attacked in this cause thus did, in its inception in 1801, invoke "novel or untried procedures" (slip opinion, No. 278, p. 9) in that private homes, as such, not affected with any public use, were by its terms laid open to invasion by officials without warrants. The early Maryland legislation did not afford any "historic sanctions" (slip opinion, No. 278, p. 13) for such invasion.

## II.

The Court refers twice (slip opinion, No. 278, pp. 7, 13) to the fact that the ordinance and procedures here attacked do not authorize intrusion by the officer over the householder's refusal of entry, although the ordinance does impose a fine for such refusal. Surely the power to fine,

coupled with the ability to make repeated requests to enter, each refusal punishable by a fine, comprise as substantial and effective a means "to force entry" (slip opinion, No. 278, p. 7) as actual application of physical force "to break past the unwilling occupant" (*Id.*).

III.

That "pervasive breakdown in the fibre of a people which is produced by slums and the absence of the barest essentials of civilized living" (slip opinion, No. 278, p. 11), postulated by the Court as an effect of requiring that sanitary inspectors defer to the same constitutional safeguards as any other law enforcement officers, is not more to be feared than that suffocation of the spirit of a people which is the inevitable concomittant of their subjection to the procedures of a police state. Not even the shortest step along that way should be condoned by the Court. No man should be required to bend the knee to the arbitrary demand of any government enforcement officer, acting on his own.

IV.

That protestants against unwarranted searches may be few, or that "dominant public opinion" (slip opinion, No. 278, p. 12) may sanction such procedures, would scarcely seem conclusive considerations.[1] Constitutional right, except perhaps in its initial acceptance by the people as a vital part of our governmental structure, has never been thought to depend upon evanescent popular acclaim. Whether "an insignificant few" (slip opinion, No. 278, p. 12), or the whole citizenry, seek to assert the right does not affect its existence or validity. All tyranny, perhaps, begins with

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[1] *Non enim numero haec judicantur, sed pondere* [Not number, but weight is our test in these matters]. — Cicero, *De Officiis*, II., 22, 79.

inconsequential seeming encroachment on the rights of an unimportant minority, but too often ends with entire deprivation of the liberties of all.

This petition for rehearing should be granted and this cause should be set down for reargument on the regular calendar.

Respectfully submitted,

BENJAMIN LIPSITZ,
Counsel for Appellant.

I certify that this petition is presented in good faith and not for delay.

BENJAMIN LIPSITZ,
Counsel for Appellant.